

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JEFFREY B. GUINN AND MONICA
A. GUINN, individually and as
Trustees of the DEL MAR TRUST, R.
KENT BARRY AND MARY
SUNSHINE BARRY, individually and
as Trustees of the BARRY FAMILY
TRUST, SEAN P. CORRIGAN AND
LISA D. CORRIGAN, individually and
as Trustees of the S&L CORRIGAN
FAMILY TRUST, CORONADO
CANYONS, LLC, PACIFIC SUNSET
DEVELOPMENT, LLC,

Appellants,

vs.

FEDERAL DEPOSIT INSURANCE
CORPORATION, AS RECEIVER FOR
COMMUNITY BANK OF NEVADA,

Respondent,

Case No:

**ORDER OF CERTIFICATION
FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEVADA**

USDC Case No: 2:09-cv-01809-
PMP-CWH

Pursuant to Nevada Rule of Appellate Procedure 5, the United States District Court for the District of Nevada presents the following certified questions to the Nevada Supreme Court, which may be determinative of claims made in a cause now pending in the District of Nevada and as to which it appears there is no controlling precedent in the decisions of the Nevada Supreme Court.

1 **I. QUESTIONS OF LAW TO BE ANSWERED**

- 2 A. Whether a creditor who asserts a breach of guaranty claim for
3 relief against the guarantors of a commercial loan prior to a
4 foreclosure sale or trustee's sale of the collateral securing the
5 loan (which remains pending after the foreclosure sale or
6 trustee's sale) must either amend its pleading to formally state a
7 claim for a deficiency judgment or move for summary judgment
8 on the deficiency within six months of the foreclosure sale or
9 trustee's sale to comply with NRS 40.455(1) and obtain a
10 deficiency judgment?
- 11 B. If the answer to Question No. 1 is "yes", does a written letter
12 from the creditor to the guarantors' counsel within the context of
13 settlement discussions, which identifies the purported amount
14 of the deficiency, and is delivered within six months of the
15 foreclosure sale, sufficient to constitute an application under
16 NRS 40.455(1) to obtain a deficiency judgment as part of an
17 existing litigation?
- 18 C. Is NRS 40.455(1) a substantive statute of repose or a procedural
19 statute of limitations?

20 **II. STATEMENT OF RELEVANT FACTS**

21 These certified questions relate to a claim for a deficiency
22 judgment made against the Appellants by the Respondent the Federal
23 Deposit Insurance Corporation, as Receiver for Community Bank of Nevada
24 (the "FDIC-R").

25 The deficiency claim asserted by the FDIC-R stems from a
26 \$29,020,000 loan from Community Bank of Nevada ("Community Bank") to
27 Coronado Canyons, LLC to finance the development of a mixed-use
28 retail/commercial center called Coronado Canyons in Henderson, Nevada.
The loan was secured by a Deed of Trust on the project and its property and

1 guaranteed by various individuals, entities, and trusts, all of whom are
2 Plaintiffs below and Appellants here.

3 Shortly after Coronado Canyons allegedly defaulted on the loan,
4 in April 2009, the borrowers and guarantors (combined with borrowers and
5 guarantors on other affiliated loans) filed this lawsuit against Community
6 Bank. The gravamen of Plaintiffs' Complaint consists of allegations that
7 Community Bank refused to honor alleged agreements to either lend
8 Plaintiffs additional money or extend the terms of Plaintiffs' existing loans.
9 Based on this, Plaintiffs seek contract and tort damages under several
10 different causes of action.

11 Community Bank countersued in August 2009 and asserted the
12 following three causes of action relating to the Coronado Canyons loan: (1)
13 breach of contract by Coronado Canyons; (2) breach of guaranty agreements
14 by the guarantors; and (3) breach of the implied duty of good faith and fair
15 dealing by Coronado Canyons and the guarantors. Community Bank had
16 not yet foreclosed on the property securing the loan when it filed these
17 claims.

18 A week later, Community Bank failed and the FDIC-R was
19 appointed as its receiver on August 14, 2009. The FDIC-R thereafter
20 removed the case to the United States District Court for the District of
21 Nevada.

22 On April 8, 2011, the real property securing the Coronado
23 Canyons loan was sold to the FDIC-R through a non-judicial foreclosure sale
24 for \$3,700,000 (credit bid). The FDIC-R alleges that this left a \$29,254,231.78
25 deficiency owing on the Coronado Canyons loan. Pursuant to the FDIC-R's
26 counsel, the FDIC-R's counsel sent a letter to counsel for Plaintiffs by email
27 on June 13, 2011 that, among other things, specified the purported amount
28 of the deficiency it claimed was owed on this loan, as well as the alleged
deficiency on other loans that were also part of the lawsuit.

1 On November 28, 2011 the FDIC-R amended its answer and
2 counterclaims to assert additional claims relating to loans that were not in
3 default when in filed its previous answer and counterclaims, but that the
4 FDIC alleged Plaintiffs had since defaulted on . In addition to those
5 amendments, the FDIC-R added one cause of action related to the Coronado
6 Canyons loan, which is called application for deficiency judgment. Plaintiffs
7 moved to dismiss that claim and all other claims relating to the Coronado
8 Canyons loan (for breach of the loan agreement and breach of the
9 guarantees). In their motion, Plaintiffs argued that the deficiency claim was
10 untimely under NRS 40.455(1) because it was filed more than 180 days after
11 the foreclosure sale. The FDIC-R opposed the motion, arguing that since it
12 had sued the moving borrower and guarantors over one year before the
13 foreclosure sale, it satisfied the requirements of making an application for
14 deficiency within the meaning of NRS 40.455. After hearing argument on
15 the motion, the Court determined that these questions relating to that
16 motion should be certified to the Nevada Supreme Court.

17 **III. NATURE OF THE CONTROVERSY IN WHICH THESE** 18 **QUESTIONS AROSE**

19 These questions arise in the context of a competing lender
20 liability/collection action currently pending before the Honorable Philip M.
21 Pro in the United States District Court for the District of Nevada.

22 The action in which these questions arise involves a dispute over
23 \$32 million in five separate loans made by Community Bank to certain of the
24 Plaintiffs below. The remaining Plaintiffs guaranteed those loans. Plaintiffs
25 commenced this action on April 9, 2009 by filing a Complaint in the Eighth
26 Judicial District Court, Clark County, Nevada against Community Bank,
27 Case No. A-09-587319-B. In addition to the claims discussed in the previous
28 section, the complaint asserted similar claims for each of the other four loans
in this relationship.

1 Community Bank responded to the Complaint and, in an
2 attempt to collect on the defaulted loans, asserted counterclaims for breach
3 of contract against the borrowers and breach of guarantees against the
4 guarantors on three of the loans (including the Coronado Canyons loan that
5 is the subject of these certified questions). Community Bank had not
6 foreclosed on any of the collateral securing the loans at the time it asserted
7 its counterclaims.

8 Around the same time, on May 29, 2009, Community Bank filed
9 a separate action, Eighth Judicial District Court Case No. A-09-591362-B,
10 against Plaintiff Coronado Nevada, LLC. By stipulation of the parties, the
11 Eighth Judicial District Court ordered those two actions consolidated on
12 July 14, 2009.

13 As stated above, the Nevada Financial Institutions Division took
14 control of Community Bank and appointed the FDIC as receiver for
15 Community Bank. As a result of this appointment, the FDIC-R has,
16 pursuant to 12 U.S.C. §§ 1821(d)(2)(A)(i) and 1821(d)(2)(B)(i), succeeded to
17 "all rights, titles, powers, and privileges" of Community Bank and may "take
18 over the assets of and operate" Community Bank with all the powers
19 thereof. This includes the resolution of outstanding claims against the
20 institution in receivership. 12 U.S.C. § 1821(d)(3). Given this, the Eighth
21 Judicial District Court entered an Order on August 31, 2009 substituting the
22 FDIC-R for Community Bank in Case No. A-09-587319-B and substituting
23 the FDIC-R for Community Bank in Case No. A-09-591362-B.

24 Since that time, the FDIC-R amended its counterclaims to state
25 additional claims for either breach of contract or a deficiency judgment for
26 the two other loans that were not in default when this lawsuit started, but
27 which have allegedly since gone into default. It was in the context of this
28 action that the FDIC-R amended its counterclaim to assert a claim for a

1 deficiency judgment against the appellants, which the appellants attacked
2 on the motion to dismiss described above.¹

3 **IV. DESIGNATION OF PARTIES**

4 The Appellants in the Nevada Supreme Court (who are among
5 the Plaintiffs/Counterclaim defendants below) are:

- 6 • Coronado Canyons, LLC;
- 7 • Jeffrey B. Guinn, individually and as Trustee of the Del
8 Mar Trust;
- 9 • Monica A. Guinn, individually and as Trustee of the Del
10 Mar Trust;
- 11 • R. Kent Barry, individually and as Trustee of the Barry
12 Family Trust;
- 13 • Mary Sunshine Barry, individually and as Trustee of the
14 Barry Family Trust;
- 15 • Sean P. Corrigan, individually and as Trustee of the S&L
16 Corrigan Family Trust;
- 17 • Lisa D. Corrigan, individually and as Trustee of the S&L
18 Corrigan Family Trust; and
- 19 • Pacific Sunset Development, LLC.

20 The Respondent in the Nevada Supreme Court (the
21 Defendant/Counterclaimant below) is:

- 22 • The Federal Deposit Insurance Corporation, as Receiver
23 for Community Bank of Nevada.

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¹ The United States District Court denied the Appellants' motion to
dismiss without prejudice pending resolution of these certified questions.

V. DESIGNATION OF COUNSEL

Appellants' counsel is:

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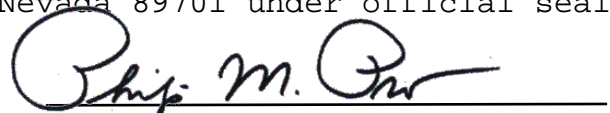
VI. OTHER MATTERS

The parties request the opportunity to brief and argue these certified questions pursuant to Nevada Rule of Appellate Procedure 5(g)(2)-(3).

The Court defers to the Nevada Supreme Court to decide whether it requires any other information to answer the certified questions. The Court does not intend its framing of the questions to limit the Nevada Supreme Court's consideration of the issues.

Having complied with Nevada Rule of Appellate Procedure 5(c)'s provisions, the Court hereby directs the Clerk of Court to forward this Order to the Supreme Court of the State of Nevada, 201 South Carson Street, Carson City, Nevada 89701 under official seal.

Dated: May 14, 2012



Philip M. Pro
United States District Judge